

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

DANA C. PATTERSON

CASE NO. 04-62894

Debtor

Chapter 13

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

**MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

Under consideration by the Court is the confirmation of the chapter 13 plan filed by Dana C. Patterson ("Debtor"). The Debtor's initial plan was filed on April 24, 2004. On May 25, 2004, an objection to the Debtor's plan was filed on behalf of Bank of America (the "Bank"). On June 2, 2004, the Debtor filed an amended plan, and on June 14, 2004, he filed a second amended plan ("Amended Plan"), which is presently before the Court.

The confirmation hearing on the Amended Plan was held on July 27, 2004, in Syracuse,

New York. At that hearing, the Court indicated that it would schedule an evidentiary confirmation hearing (“Evidentiary Hearing”) to address the Bank’s objection to the Amended Plan pursuant to § 1325(a)(3) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (“Code”).¹ The Evidentiary Hearing was originally scheduled for September 13, 2004, but was adjourned to October 13, 2004, in Utica, New York. Following testimony by the Debtor, the Court indicated that it would take the matter under submission.

JURISDICTIONAL STATEMENT

The Court has jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(1) and (b)(2)(A), (L) and (O).

FACTS

The Debtor filed a voluntary petition (“Petition”) pursuant to chapter 13 of the Code, as well as his original plan on April 24, 2004. He filed his schedules on June 14, 2004, in which he lists two creditors. He lists the Bank as a secured creditor with a claim of \$110,000, and he lists Spiegel as an unsecured creditor with a claim of \$150. *See* Schedules D and F, respectively. According to Schedule I, the Debtor’s net income from his employment as a chef at “Wegmans”

¹ At the hearing on October 13, 2004, the Bank represented to the Court that it was no longer objecting to the feasibility of the Debtor’s plan based on changes the Debtor had incorporated into the Amended Plan with respect to the treatment of the Bank’s claim. Accordingly, the Court’s focus is limited to addressing the Bank’s argument that the Debtor’s Amended Plan was filed in bad faith pursuant to Code § 1325(a)(3).

is \$2,508.98 per month. He also lists net income of \$1,720.32 earned by his wife as a foods manager at “Wegmans”. *See* Schedule I. The combined monthly net income is \$4,229.30. *Id.* The Debtor also lists monthly expenses of \$2,930, of which \$1,140 is identified as his home mortgage payment to the Bank. *See* Schedule J. Under his Amended Plan, the Debtor proposes to make monthly payments of \$1,300 to the chapter 13 trustee (“Trustee”), which include payments to the Bank on its arrears of approximately \$60,000² and a 10% dividend to Spiegel.

At the Evidentiary Hearing, the Bank submitted evidence of three other chapter 13 filings by the Debtor and his wife, Greta M. Patterson (the “Debtor’s Spouse”). *See* Bank’s Exhibit 1. On July 14, 1998, the Debtor’s Spouse filed a chapter 13 petition (Case No. 98-64527). A review of the docket in that case indicates that on January 27, 1999, a conditional order was signed by the Court with respect to a motion seeking relief from the automatic stay on the Residence by NationsBanc Mortgage Corporation, apparently the Bank’s predecessor in interest (Doc. No. 8). On April 12, 1999, an Affirmation of Non-Compliance, presumably with the conditional order of January 27, 1999, was filed by the mortgagee (Doc. No. 9). On November 8, 2001, the Trustee filed his Final Report and Account and on December 12, 2001, a final decree was entered closing the case (Doc. Nos. 15 and 18).³

While his wife’s chapter 13 case was still pending, the Debtor filed a voluntary petition

² According to the Bank’s proof of claim, filed on May 20, 2004, its total claim amounts to \$128,124.52, of which it lists \$60,455.66 as arrears on its mortgage on the Debtor’s residence located at 8263 Cottonwood Court, Liverpool, New York (the “Residence”).

³ An Order granting the Debtor a discharge was entered on November 8, 2001 (Doc. No. 16). However, it is not possible to determine from the docket the total amount of payments made by the Debtor’s Spouse to the Trustee. Nor is it possible to determine the number of creditors in that case due to the fact that the records of the closed case are no longer on file with this Court.

pursuant to chapter 13 (Case No. 99-64029) on July 21, 1999. *See* Bank's Exhibit 1. At the time of the 1999 filing, the Debtor listed in his schedules net income of \$1,869 as fish manager for Wegmans and net income of his wife of \$1,253, or a combined net monthly income of \$3,122.⁴ His monthly expenses were listed at \$2,502, leaving estimated disposable income of \$620. According to the Order confirming the Debtor's plan in that case, the Debtor was to make monthly payments of \$620 for 25 months and monthly payments of \$870 for 35 months for a total of \$45,950. The only creditor in the case was the Bank, again identified as Nationsbank Mortgage Corporation.

According to the docket in the Debtor's 1999 case, an Order approving a stipulation between the Debtor and the Bank, dated November 9, 2001 ("Stipulation"), was signed by the Court on November 15, 2001 (Doc. No. 19). On January 21, 2003, the Bank filed its Affidavit of Non-Compliance with respect to the terms of the November 15th Order ("January 2003 Affidavit") (Doc. No. 20). According to the January 2003 Affidavit, the Debtor allegedly had failed to make the monthly mortgage payments for the months of January 2002 through November 2002. Under the terms of the Stipulation, the automatic stay was terminated "without the need of bringing on any further application to the Court." *See* Stipulation attached to

⁴ A bankruptcy judge may take judicial notice of the court's records. *See Matter of Holly's, Inc.*, 172 B.R. 545, 553 n.5 (Bankr. W.D. Mich. 1994); *see also In re Calder*, 907 F.2d 953, 955 n.2 (10th Cir. 1990). Although the documents filed in the 1999 and 2003 cases by the Debtor and his spouse were not offered into evidence, this Court has an independent duty to investigate its records and to consider the totality of circumstances in determining if a chapter 13 plan was filed in good faith, whether or not an objection has been filed by a creditor. *See generally, In re Villanueva*, 274 B.R. 836, 841 (9th Cir. BAP 2002); *In re Fulton*, 211 B.R. 247, 255 (Bankr. S.D. Ohio 1997).

Affidavit of Non-Compliance, filed January 21, 2003 (Doc. No. 20).⁵

On April 22, 2003, Debtor's Spouse filed her second chapter 13 petition (Case No. 03-62743). *See* Bank's Exhibit 1. At the time, the Debtor's Spouse listed net income of \$1,713 as Nature's Market Manager for Wegmans and net income of the Debtor of \$2,123 as Assistant Meat Manager, or a combined net monthly income of \$3,836. Their monthly expenses were listed as \$3,031, leaving estimated disposable income of \$805. According to the Order confirming the plan in the 2003 case, signed July 25, 2003, the Debtor's Spouse was to make monthly payments of \$805 over a period of 60 months for a total of \$48,300. In her schedules she lists only the Bank as a creditor with a claim of \$120,781.94, as set forth in its proof of claim filed on June 17, 2003.

According to the docket in the 2003 case, on December 18, 2003, the Court again signed a conditional order granting relief from the automatic stay in favor of the Bank, which provided that in the event of a default by the Debtor's Spouse, upon the filing of an Affidavit of Non-Compliance, the automatic stay "as it pertains [sic] Bank of America, it's [sic] successors and/or assigns, imposed by the filing of the petition, shall be vacated . . ." (Doc. No. 13). On February 9, 2004, the Bank filed its Affidavit of Non-Compliance with the December 18th Order (Doc. No.

⁵ On August 13, 2003, the Trustee filed a Final Report and Account in the Debtor's 1999 case which shows receipt of \$31,985.03 in payments from the Debtor, of which \$24,076.52 was allegedly paid to the Bank (Doc. No. 26). An Order discharging the Debtor was signed on August 8, 2003 (Doc. No. 27). It appears that because the Bank was his sole creditor, once the automatic stay had been lifted as a result of the Debtor's alleged default, there was no reason for the Trustee to continue administering the case. The filing of the Trustee's Final Report and Account automatically resulted in the issuance of a discharge to the Debtor by the Clerk's office despite his failure to complete the payments under the terms of his plan.

14).⁶

On April 24, 2004, the Debtor filed a voluntary chapter 13 petition which is now pending in this Court. On May 21, 2004, the Bank filed a motion seeking relief from the automatic stay on the basis that the Debtor allegedly had failed to make the payment due May 1, 2004. On July 2, 2004, the Court signed a Conditional Order requiring that the Debtor cure all postpetition arrears by June 22, 2004 and remain current with his regular payments (Doc. No. 16).⁷

At the hearing on October 13, 2004, the Debtor testified that he was current with his payments to the Trustee by way of a wage order. He was also prepared to bring his monthly payments to the Bank current on that day. The Debtor acknowledged the three prior bankruptcy filings by him and his wife. When asked by the Court the primary reason for his inability to make the mortgage payments in the past, he explained that financial problems had led to marital problems, which, in turn, resulted in he and his wife having to support separate households intermittently. He testified further that prior to any of the bankruptcy filings, he had experienced problems with alcoholism and had even encountered “trouble with the law.” He had enrolled in a rehabilitation center in approximately 1996 and in approximately 2000 he had received

⁶ The Trustee filed his Final Report and Account on September 7, 2004, which shows receipt of \$7,111.53 in payments from the Debtor’s Spouse, of which \$5,720.48 was paid to the Bank (Doc. No. 16). An Order discharging the Debtor’s Spouse was signed on September 8, 2004 (Doc. No. 17), approximately 18 months after she filed her petition despite the fact that she had not completed the payments provided for in her plan.

⁷ The Order signed by the Court on July 2, 2004, contains an obviously erroneous provision that “in the event this case is dismissed, any future filing by any individual or entity claiming to have an interest in the real property commonly known as **35 Cedar Lane, Scotia, New York shall not act as a stay against the Washington Mutual Bank, F.A.**, its successors and or assigns lien interest in the aforementioned real property for 180 days.” There is no reference to either the Residence or the Bank in that particular ordering paragraph.

outpatient treatment for his alcohol problem. He now attends meetings of Alcoholics Anonymous and he and his wife are also seeing a marriage counselor. They are also working with a financial consultant with respect to their budget. He acknowledged that “things have been great” for the past year, despite the expenses associated with raising three children. He and his wife are both employed by the same employer, he for approximately 16 years and she for approximately 20 years. Over recent years, they have received promotions and have experienced an increase in their salaries as a result. According to the schedules, they earn approximately \$72,000 in combined gross income per year or almost \$51,000 in combined net income.

DISCUSSION

As part of the confirmation process in a chapter 13 case, Code § 1325(a)(3) requires that a plan be “proposed in good faith and not by any means forbidden by law.” 11 U.S.C. § 1325(a)(3). It is the Debtor, as the proponent of the plan, that has the burden of proving that it has been proposed in good faith. *See In re Edwards*, No. 03-10018, 2004 WL 316418, at *10 (Bankr. D. Vt. Feb. 13, 2004). Whether or not a plan is proposed in good faith requires the Court to examine the totality of circumstances of the case. *See id.*; *In re Corino*, 191 B.R. 283, 288-89 (Bankr. N.D.N.Y. 1995). In making this determination,

The central and more pertinent inquiry . . . is whether the debtor came to bankruptcy court seeking a fresh start under Chapter 13 protection with an intent that is consistent with the spirit and purpose of that law - rehabilitation through debt repayment - or with an intent contrary to its purposes - debt avoidance through manipulation of the Code.

In re McGovern, 297 B.R. 650, 660 (Bankr. S.D. Fla. 2003); *see also Corino*, 191 B.R. at 289

(indicating that ultimately the courts must examine whether there has been an abuse of the provisions, purpose or spirit of the Code). To this end, the courts have generally considered the following factors:

(1) the probable duration of the plan, (2) the frequency of bankruptcy filing, (3) the accuracy of the bankruptcy papers, (4) the debtor's motivation and sincerity of Chapter 13 filing, (5) the creditors, (6) the circumstances of incurring debt, (7) the nature and quantity of unsecured debt, (8) if the debt was otherwise nondischargeable, (9) the amount of attorneys fees, (10) the burden of administration, (11) special circumstances like medical costs, (12) the debtor's degree of effort, (13) the debtor's ability to earn, (14) the debtor's employment history and likelihood of future raises, (15) the percentage of debt repayment, (16) the amount of proposed payments, (17) the amount of budget surplus [and] (18) the general tests of "fundamental fairness", "totality of circumstances" and "honesty of intention."

In re Ochs, 283 B.R. 135, 138 (Bankr. E.D.N.Y. 2002) (citations omitted).

With that in mind, the Court will examine the factors applicable to the matter herein.

Duration of the Plan

Debtor proposes to pay \$1,300 per month over a period of 60 months, or a total of \$78,000.

Frequency of bankruptcy filings

As set forth above, this is the fourth filing by the Debtor or his spouse between July 1998 and April 2004, a period of approximately six years. None of the previous three chapter 13 plans were completed despite the Debtor and his spouse having received a discharge in each case.

Accuracy of the bankruptcy papers

There have been no allegations of inaccuracies in the Debtor's schedules as to his assets and liabilities.

Debtor's motivation and sincerity in filing his petition

The Debtor was credible in his testimony concerning his prior filings and the financial difficulties he and his wife have experienced in recent years. He appeared sincere in his desire to honor his obligations with the Bank and to retain their Residence.

Creditors and Nature of the Debt

As noted above, the only two creditors are the Bank and a single unsecured creditor owed approximately \$150. According to the claims registry, no claim was filed by the unsecured creditor and the bar date of September 13, 2004, has passed.

Debtor's Ability to Earn, including Employment History

The Debtor testified, without dispute, that both he and his wife have been employed by "Wegmans" for over 15 years and both have received promotions and associated increases in salary. As noted above, their combined gross income currently totals \$72,000. Based on these facts, it is clear that the Debtor and his wife have an excellent employment history and are both able to contribute their earnings to the Debtor's Amended Plan.

Fundamental Fairness, Totality of Circumstances and Honesty of Intention

Based on the Debtor's schedules, it is evident to the Court that he and his wife are conscientious in the payment of their debts, with the exception of the Bank, whose claim is the only one to be paid under the terms of the Amended Plan. The Court normally takes a dim view of serial filers who simply file their petition to stay their various creditors from enforcing their rights without any intention whatsoever to repay their debts. In this case, the dockets in the three previous cases indicate an effort, albeit unsuccessful, to remain current on their mortgage payments while paying the arrears. Currently, they owe in excess of \$60,000 in arrears, and they

now propose to pay all of their monthly disposable income of \$1,300 to cure those arrears while making their regular monthly payments to the Bank of approximately \$1,141, including taxes and insurance. The Debtor testified that he is attending AA meetings and he and his wife are seeing a marriage counselor. He also testified that they are working with a financial counselor on their budget. The Court finds that the filing of multiple petitions, in and of itself, does not establish that the Amended Plan was filed in bad faith under the circumstances. Accordingly, the Court concludes that it will confirm the Amended Plan in order to allow the Debtor an opportunity to take advantage of the fresh start the Code was intended to provide to individuals such as the Debtor and his wife who have demonstrated an honesty of intention to pay their debts in the face of prior adversity.

Based on the foregoing, it is hereby

ORDERED that the Bank's objection to the Debtor's Amended Plan, filed June 14, 2004, pursuant to Code § 1325(a)(3) is denied; and it is further

ORDERED that the Trustee submit an Order confirming the Amended Plan, filed June 14, 2004, for signature by the Court in this case.

Dated at Utica, New York

this 29th day of October 2004

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge